NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES ,	)	
Plaintiff,	)	
v.	)	**Criminal No. 2007-18**
DARVIN EVERETTE RICHARDSON,	)	
Defendant.	)	

Attorneys:

Ishmael Meyers, AUSA
For plaintiff, the United States,

Jesse Gessin, AFPD,
For defendant, Darvin Richardson.

ORDER

Before the Court is the motion of defendant, Darvin Everette Richardson ("Richarson") to dismiss the indictment against him.

FACTS

Richardson was born on March 31, 1996, in St. Kitts. On March 3, 1980, he legally immigrated to the United States, where he became a permanent resident.

On November 30, 1989, Richardson was arrested and charged with importing a controlled substance and possessing a controlled

substance aboard an aircraft arriving in the United States. He pled not guilty.

On February 3, 1990, the Immigration and Naturalization Service ("INS") sent Richardson a Notice and Request for Deposition (the "Notice"). The Notice informed Richardson that his immigration status was under review, and that he had various rights, including the right to representation and the right to appeal the determination.

On March 29, 1990, a jury returned a guilty verdict on both counts against Richardson. On May 14, 1990, the INS issued an Order to Show Cause, and Notice of a Hearing for Richardson, regarding his immigration status. It also issued a Warrant for Richardson's arrest. On May 16, 1990, an agent for the INS signed a "Notice to Respondent" in Richardson's case. That document again informed Richardson of his right to an attorney, and his right to protest the charges against him.

On May 21, 1990, Richardson signed a form stating that he wished to return to St. Kitts voluntarily. The form further stated that Richardson understood his legal rights, including the right to a hearing and the right to appeal any deportation order. Finally, the form indicates that Richardson waived those rights (the "First Waiver").

On May 22, 1990, Attorney David Iverson ("Iverson") filed a notice of appearance for Richardson in the INS matter. Despite Iverson's notice of appearance, Richardson has submitted an affidavit, stating that he does not recall speaking with Iverson about his case.

On May 24, 1990, Hans Burgos ("Burgos"), a trial attorney for the INS, wrote a memorandum reflecting Burgos' opinion that the First Waiver was problematic.

> After interviewing the subject, it appears he was not aware, nor was he well informed, of the consequences of signing the stipulation.

Burgos Mem., May 24, 1990; Mot. to Dismiss, Ex. 10. No one from the INS signed the First Waiver.

On June 19, 1990, Richardson signed another waiver form identical to the earlier one (the "Second Waiver"). A trial attorney from the INS signed the Second Waiver. Also on June 19, 1990, a deportation order (the "Deportation Order") was entered on behalf of the Honorable James Auslander, an Immigration Judge (the "Immigration Judge"). The deportation order stated that Richardson's rights had been explained; that Richardson admitted his deportability; and that Richardson wished to expedite his return to St. Kitts. The deportation order further indicated that Richardson waived the right to any appeal of the deportation order.

On June 22, 1990, James H. Walker ("Walker"), the INS District Director, sent a letter to Richardson. Walker wrote:

> Should you wish to return to the United States you must write this office or the American Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. By law (Title 8 of the United States Code, Section 1326) any deported person who within five years returns without permission is guilty of a felony.

Walker Letter, June 22, 1990; Mot. to Dismiss, Ex. 13.

On March 6, 2007, Richardson was arrested at the Cyril E. King Airport in St. Thomas for attempting to enter the United States without proper authorization. On April 4, 2007, the grand jury returned an indictment, charging Richardson with attempting to reenter the United States after his deportation in violation of 8 U.S.C. § 1326 (d).

Richardson now makes three arguments. First, he argues that he should be allowed to collaterally attack his deportation, because of substantive and procedural errors underlying the June 19, 1990 Order. Second, he argues that the sentencing provisions under 8 U.S.C. § 1326 (b)(2) are "plainly unconstitutional." Mot. to Dismiss, 25. Finally, Richardson argues that the United States is estopped from prosecuting Richardson, because of representations made in Walker's June 22, 1990 Letter.

ANALYSIS

A. The Waivers and Collateral Attack

To collaterally attack a deportation order, an alien must establish that: "(1) he exhausted any administrative remedy that may have been available; (2) the [deportation] hearing effectively eliminated the right of the alien to obtain judicial review from that proceeding; and (3) the prior hearing was 'fundamentally unfair.'" *United States v. Charleswell*, 456 F.3d 347, 351 (3d Cir. 2006) (citing *United States v. Torres*, 383 F.3d 92, 98-99 (3d Cir. 2004) and 8 U.S.C. § 1326 (d)). On each part of this conjunctive test, the alien bears the burden of proof. *Id.*; *see also United States v. Martinez-Amaya*, 67 F.3d 678, 682 n.5 (8th Cir. 1995) (noting that "the application of a 'preponderance of the evidence' standard of proof to an alien's collateral attack upon a prior deportation seems appropriate...in light of the fact that a deportation proceeding is civil in nature.").

Richardson signed both the First and Second Waivers, relinquishing his right to an appeal and requesting an expedited return to St. Kitts. Richardson's argument proceeds on the assumption that neither the First nor the Second Waiver is valid. The attendant facts belie that assumption.

The circumstances in this case reveal that Richardson signed two waivers. Each waiver indicated that Richardson was aware of his rights as well as the consequences of executing a waiver. Where, as here, there is a written waiver of the alien's rights, that waiver is presumed to be valid. *See, e.g., United States v. Rangel de Aguillar,* 308 F.3d 1134; *Martinez-Rocha*, 337 F.3d at 570.

While Richardson argues that he signed the Second Waiver without the advice of counsel and that there is no record of the Immigration Judge reading him his rights, these factors do not invalidate an otherwise valid waiver. Indeed where, as here, there is evidence that an INS official took the waiver,[1] there is no presumptive unfairness that attaches to the waiver absent some other evidence. *See, e.g.*, *Rangel de Aguillar,* 308 F.3d at 1138 ("We disagree with [the] contention that [a] waiver must be presumed to be unfair, because it was taken by a person at the INS, which is the same agency that arrests the alien, provides an explanation of her rights, and then determines she is deportable. Like the Fifth and the Ninth Circuits, we will not presume bias from the mere institutional structure of the INS."); *see also Xu*

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[1] The Second Waiver indicates that an INS trial attorney took and executed the waiver. *See* Mot. to Dismiss, Ex. 11. The Deportation Order similarly indicates that Richardson's rights were explained and understood. *See id.* at Ex. 12.

Yong Lu v. Ashcroft, 259 F.3d 127, 130 (3d Cir. 2001) ("Immigration proceedings... are civil rather than criminal, in nature; therefore the Sixth Amendment guarantee of effective counsel does not attach."); *Cf. United States v. Lopez-Vasquez,* 1 F.3d 751, 754 (9th Cir. 1993)(holding that mere silence in response to the question of whether any members of a group wished to appeal was not a valid waiver). Similarly, the mere fact that a waiver precludes discretionary relief does not invalidate the waiver. *See, e.g., United States v. Martinez-Rocha*, 337 F.3d 566, 570 ("[A] waiver need not be the best choice under the circumstances in order for it to be considered and intelligent.").

Given the evidence, the Court finds that the waiver is valid. This fact, alone, however does not end the Court's inquiry. The Court must still determine whether Richardson has satisfied the several elements for collateral relief.

To collaterally attack his deportation, Richardson must first show that he exhausted his administrative remedies. *See Charleswell*, 456 F.3d at 351. Richardson signed both waivers, and returned to St. Kitts. Prior to his arrest on March 7, 2006, Richardson made no attempts to challenge the validity of the waivers or his deportation. When an alien facing deportation signs a written waiver of his rights and make no further attempt

to attack his deportation, that alien has not exhausted his administrative remedies pursuant to 8 U.S.C. § 1326. *See, e.g., Rangel de Aguillar,* 308 F.3d 1134; *Martinez-Rocha*, 337 F.3d 570.

Because Richardson did not exhaust his administrative remedies, he cannot collaterally attack his deportation. Alternatively, even if Richardson had exhausted his administrative remedies, he cannot establish that he meets the other two requirements for relief.

To collaterally attack his deportation, Richardson would further need to show that the deportation hearing effectively eliminated the right of the alien to obtain judicial review from that proceeding. *See Charleswell*, 456 F.3d at 351. It did not. Indeed, Richardson's own waiver precluded judicial review of his deportation.

Richardson would also need to establish that the deportation proceeding was "fundamentally unfair." *See Charleswell*, 456 F.3d at 351. The "[p]rejudice necessary for a deportation proceeding to be 'fundamentally unfair,' as required for an alien to collaterally attack the deportation order in a subsequent criminal proceeding, requires a reasonable likelihood that the result would be different if the error in the deportation hearing had not occurred." *Id.* at 352.

Richardson argues that prejudice arose, because he may have been eligible for discretionary relief under 8 U.S.C. § 1182 (c). Richardson cites favorable considerations, like the length of his residence and family members legally residing in the United States. *Cf. Matter of Edwards*, 20 I. & N. Dec. 191, 195 (B.I.A., May 2, 1990). Yet, his argument fails to account for a significant adverse factor weighing against discretionary relief: his recent conviction for importing narcotics. That adverse factor, alone, could have precluded him from relief. *See id; United States v. Figueroa-Taveras*, 69 Fed. Appx. 502, 503 (2d Cir. 2003) (unpublished) (finding that a defendant could not show prejudice when narcotics convictions would likely have precluded § 212(c) relief).

Ultimately, this Court need not speculate as to exactly how an immigration judge would weigh these factors. An alien who is eligible for discretionary relief from deportation cannot show that he was prejudiced by an immigration judge's failure to grant that relief. *See United States v. Cisneros-Garcia*, 159 Fed. Appx. 464, 467 - 69 (4th Cir. 2005) (unpublished) (holding that prejudice required a due process violation and "there is no due process right to § 212(c) relief").

Accordingly, Richardson has not shown that he can collaterally attack the Deportation Order. His motion to dismiss on these ground will be denied.

B. Sentencing Guidelines

Richardson also argues that 8 U.S.C. § 1326 (b)(2) is unconstitutional. He argues that the statutory enhancements he may face for an illegal reentry conviction are constitutionally impermissible.

Richardson has entered a plea of not guilty on the charges in this case. The matter has not yet proceeded to trial. Accordingly, Richardson has no standing to challenge the sentence, the occurrence of which is contingent on a conviction for which there is no guarantee. See, e.g., *United States v. Isauro Samora-Sanchez*, 122 Fed. Appx. 909, 911 (10th Cir. 2004) (unpublished) (holding that in the context of sentencing provisions, a defendant must show that the sentencing provision affects his sentence); *United States v. Hernandez-Gonzalez*, 163 Fed. Appx. 519, 520n (9th Cir. 2006) (unpublished) (holding that a defendant who has not been sentenced under the Federal Sentencing Guidelines, lacks standing to challenge their constitutionality.)

C. Prosecution Estoppel

Finally, Richardson argues that he reasonably relied on

Walker's letter, as a definitive statement of the law. Specifically, Richardson reads Walker's warning that he will be liable for felony prosecution for attempting to re-enter without permission within five years, to say that he will not be liable for criminal prosecution if he waits five years or more. In essence, Richardson seeks dismissal based on a mistake of law defense.

"Although the basic policy behind the mistake of law doctrine is that, at their peril, all men should know and obey the law, in certain situations there is an overriding social interest in having individuals rely on authoritative pronouncements of officials whose decisions we wish to see respected." *United States v. Barker*, 546 F.2d 940, 947 (D.C. Cir. 1976); *see also United States v. Mancuso*, 139 F.2d 90 (3d Cir. 1943).

Mistake of law is an affirmative defense. *See United States v. Duggan*, 743 F.2d 59, 83-85 (2d Cir. 1984) (discussing the mistake of law defense generally). "An 'affirmative defense' is a complete defense that... negates criminal liability for an offense, notwithstanding that the [government] has otherwise proven all the elements of that offense beyond a reasonable doubt." *Aparicio v. Artuz*, 269 F.3d 78, 98 (2d Cir. 2001). To prevail on an affirmative defense, the defendant bears the burden

of proof, by the preponderance of the evidence at trial. *See id.*; *see also United States* v. Bullard, 38 Fed. Appx. 753, 754 (3d. Cir. 2002) (not precedential) (finding the district court properly instructed a jury that the defendant bears the burden of proof by the preponderance of the evidence on his affirmative defenses).

As a result, Richardson is not entitled to any pre-trial relief on the basis of his mistake of law defense.

CONCLUSION

For the reasons discussed above, it is hereby **ORDERED** that Richardson's motion to dismiss is **DENIED**.

Dated: June __, 2007

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Curtis V. Gómez
Chief Judge

Courtesy Copy:
Honorable Geoffrey Barnard
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